No. 83-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNION CARBIDE CORPORATION,
FMC CORPORATION,
MONSANTO COMPANY,
EXXON CORPORATION,
AMERICAN MINING CONGRESS,
AMERICAN IRON & STEEL INSTITUTE,
AND AMERICAN PETROLEUM INSTITUTE,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
ENVIRONMENTAL DEFENSE FUND, INC.,
CITIZENS FOR A BETTER ENVIRONMENT,
AND BUSINESSMEN FOR THE PUBLIC INTEREST, INC.,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether, contrary to this Court's decisions in *System Federation No. 91* and *Vermont Yankee*, the consent decree entered, modified, and continued in this case contravenes constitutional separation-of-powers principles by requiring an official of the Executive Branch, the Administrator of EPA, to undertake regulatory programs and to apply regulatory criteria not mandated by the Clean Water Act.

2. Whether Congress intended that the Clean Water Act of 1977 supersede the consent decree.

3. Whether the district court has jurisdiction to preserve and enforce the consent decree if the underlying causes of action are moot.

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

The main question presented in this case is important and worthy of this Court's attention, as the federal respondent ("EPA") acknowledges. EPA's Response, at 11. Whether a consent decree involving a federal agency can require that agency to exercise its statutorily-conferred discretion in a particular way is an unresolved and recurring question of considerable practical and legal significance to administrative law in this country. This

case poses that question in a procedurally proper setting where a sharply divided court of appeals explored the merits of the issue after lengthy and detailed consideration. EPA nonetheless suggests that the Court should deny certiorari, and Natural Resources Defense Council, *et al.* ("NRDC") have strongly opposed granting the writ. The reasons given by them, however, actually illustrate the desirability of review by this Court.

A. The Constrained-Discretion Question Is An Important And Recurring Issue Of Law Which Arises In An Area Where This Court's Role Historically Has Been Especially Important

1. NRDC's response perhaps makes the best argument for review by this Court. NRDC acknowledges that the consent decree in this case imposes significant constraints on EPA's discretion and argues that imposition of such constraints was fully within the district court's power.[1] NRDC, however, nowhere explains the jurisdictional basis for the district court's entry of a decree curtailing EPA's

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[1] NRDC summarizes its views as follows:

> In essence, NRDC claimed that EPA applied the wrong statutory criteria and did not exercise its discretion properly. EPA claimed the opposite. A classic settlement followed where the parties agreed on the appropriate criteria and an appropriate way to guide EPA's exercise of discretion within the authority provided by the Act.
>
> If a court had no power to enter such a settlement, it would surely chill the judicial policy favoring settlement in any case where the alleged violations include an abuse of discretion.
>
> NRDC's Response, at 12 (footnote omitted).

EPA circumspectly avoids any characterization of the nature of the constraints on its discretion due to the decree. Instead, it argues that a discretion-constraining decree is "appropriate" where the required course of action "is substantively in accord with the agency's intentions and of relatively brief duration." EPA's Response, at 11. EPA thus argues substantively that *de minimis* or small constraints are permissible, and by doing so perhaps might seem to imply that the constraints in the decree in this case fall into that category. They do not, for the reasons noted by both the majority and the dissent in the court of appeals. *See* 718 F.2d 1122-24 (majority) and 1182-83 (dissent), Pet. App. 13a-17a, 33a-36a.

discretion, or the rationale for avoiding constitutional separation-of-powers limits on the exercise of the jurisdiction possessed by the district court.[2] Moreover, although NRDC does not ask this Court to limit a fundamental separation-of-powers tenet first explicated by this Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that is the effect of its argument. In *Marbury*, Chief Justice Marshall's opinion for this Court said:

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[2] Such jurisdiction is not supplied by 28 U.S.C. § 1361 (added by the Mandamus and Venue Act of 1962). Each of the four complaints cited that statute as a basis for the district court's jurisdiction (Ct. Appls. Appendix in Nos. 76-1664, etc., at 15-16, and Ct. Appls. Appendix in Nos. 79-1473, etc., at 67-68, 79, and 96), but mandamus lies only to correct a non-discretionary governmental duty or action. *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). The citizens-suit provision in 33 U.S.C. § 1365(a)(2), also cited by NRDC in the complaints, similarly pertains only to an alleged "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."

The federal-question jurisdictional statute, 28 U.S.C. § 1331, when taken together with the Administrative Procedure Act, authorizes review of agency action among other things to determine whether there has been an abuse of discretion. However, when such an abuse is found, the remedy is to remand for the agency to correct its error, not to interpose a specific judicially-dictated action. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Even a less-sweeping argument by NRDC—that the contested EPA actions were arguably or colorably compelled by the statute—would not have sufficed to support the district court's decree. As this Court said in *ICC v. New York, New Haven & Hartford R.R.*, 287 U.S. 178, 204 (1932) (Cardozo, J.):

> Where a duty is not plainly prescribed, but is to be gathered by doubtful inference from statutes of uncertain meaning, "it is regarded as involving the character of judgment or discretion," (*Wilbur v. United States ex rel. Kadrie, supra*), and mandamus is thereby excluded.

Compare NRDC's Response, at 11-13.

In short, NRDC's theory of this case is fundamentally at odds with longstanding constitutional and statutory principles of federal jurisdictional and administrative law.

> Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.
>
> (5 U.S. at 170-171.)

Ever since *Marbury v. Madison*, this Court has undertaken a special role in arbitrating constitutional separation-of-powers issues. This case stems from the same root as the Court's prior decisions on the subject and deserves this Court's attention.[3]

2. The separation-of-powers issue is, as EPA's response says, "of undoubted importance." EPA's Response at 11. The issue has arisen in a number of other cases, and is of obvious relevance to the ongoing practical functioning of federal administrative law, particularly in light of the burgeoning number of lawsuits being brought under various statutory citizens-suit provisions to force agency action alleged to be unlawfully withheld. Considerable pressure exists in such cases to turn the focus of settlement discussions away from statutorily-mandated actions, and instead to emphasize actions that fall within the agency's discretion, as this case illustrates.[4]

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[3] In a mistake so evident as to be startling, NRDC's response refers to the supremacy clause rather than separation-of-powers principles as the basis for the constitutional claim in this case. NRDC's Response, at 10.

[4] This tendency is understandable, given the broader power typically available to an agency under its discretionary authority.

The relative importance of the issue is also shown by the number of votes of active judges in the D.C. Circuit to hear this case *en banc*. (Pet. App. 206a.) Also, in one of the other pending cases cited in EPA's response as raising a similar question, *Alliance To End*

3. The precedent established by the D.C. Circuit's decision will have a considerably greater impact on federal administrative law than a decision by another court of appeals. Depending upon the statutory scheme for judicial review, either the U.S. District Court for the District of Columbia or the U.S. Court of Appeals for the District of Columbia Circuit often is a nationally available forum for a plaintiff or a petitioner who desires to contest agency action. Indeed, under some statutes, the D.C. federal courts provide the only permissible venue.[5] Moreover, because of the D.C. Circuit's diverse administrative-review caseload, the precedent established by the panel majority of that court in this case will affect many different agencies and circumstances. It is quite relevant that a decision which will be so broadly applied is wrong.[6]

B. No Procedural Impediment Exists Which Would Hinder This Court's Consideration Of The Questions Presented

1. Each of the questions presented is properly before the Court. Each was put at issue before the district

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Repression v. Chicago, Nos. 83-1853, etc. (7th Cir.), the U.S. Court of Appeals for the Seventh Circuit has granted rehearing *en banc* and will rehear argument on June 13, 1984. The main question presented in that case, however, involves the interpretation of a consent decree rather than its validity.

Finally, as noted in the petition at 20-21 n.18, the decision of the court of appeals in this case conflicts with the decision of the Ninth Circuit in *Washington v. Penwell*, 700 F.2d 570 (9th Cir. 1983) (supremacy clause grounds for constitutional limitation on district court's power).

[5] *E.g.*, Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1).

[6] The dissent by Judge Wilkey more faithfully reflects this Court's prior rulings in *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), and related cases. Notably, although NRDC supports the panel majority's rationale, EPA's response adopts a position tending more toward Judge Wilkey's dissent than to the majority. *See* EPA's Response, at 11-12 & n.15, in part quoted *supra*, at n.1.

court and thereafter in the court of appeals, and decided on the merits by both of those courts.[7]

2. Similarly, there is no danger that the case will become moot during this Court's consideration. Both NRDC and EPA claim that discretion-constraining aspects of the decree have either been or are about to be completed, but they do not address all of EPA's continuing work under the pertinent parts of the decree. EPA's work to implement paragraph 12 of the decree, one of the discretion-constraining provisions, has in fact been completed, now that NRDC has withdrawn its earlier objections.[8]

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[7] EPA does raise two red herrings. EPA's response halfheartedly suggests that petitioners may not have standing to raise these questions and that the dispute may not be ripe for review because petitioners can challenge any final rules EPA may issue. EPA's Response, at 12-13 n.17. These two claims were never presented either to the district court or to the court of appeals, and they have no basis. An argument by EPA somewhat akin to that now put under the ripeness label was raised in the appellate litigation over the entitlement of some of the petitioners to intervene as of right under Fed. R. Civ. P. 24(a)(2). The court of appeals in 1977 rejected that claim, among others, and ruled that petitioners were entitled to intervene as of right. *NRDC v. Costle*, 561 F.2d 904 (D.C. Cir. 1977). Neither EPA nor anyone else contested the matter further.

[8] One of the peculiarities of the decree in this case is that EPA often is able to assure itself that it has completed a task only when NRDC concedes as much. For example, EPA initially published its "Paragraph 12 Strategy" on February 3, 1982 (Ct. Appls. Appendix, at 772) and should then have been able to treat paragraph 12 as fulfilled. However, on March 15, 1982, NRDC wrote the Agency to assert "that EPA stands in direct violation of the Consent Decree," on the ground that EPA's published strategy was inadequate. (Ct. Appls. Appendix, at 705.) NRDC threatened action to seek a contempt citation from the district court:

> In sum, EPA has failed in every material respect to comply with Paragraph 12. We request a meeting with you to discuss these violations and to consider any solutions you might care to offer. If we do not hear from you within two weeks, we will seek a contempt citation against you.
>
> (Ct. Appls. Appendix, at 711.)

The dispute between EPA and NRDC was not resolved until NRDC filed its response to the petition in this case. Only then, and

However, as both EPA and NRDC acknowledge, EPA has work remaining under paragraphs 7 and 8 of the decree. Paragraph 7 requires EPA to establish effluent limitations regulations for specified industries under a court-imposed deadline, and paragraph 8 specifies criteria not mandated by the statute for EPA's decisions as to the coverage of such regulations.[9] In addition, despite NRDC's and EPA's claims that the Agency has completed its work under paragraph 4(c), another discretion-constraining provision, the Agency in a very recent report has estimated that another 26 to 32 months actually will be required to complete its work under that provision.[10] In short, EPA still has over two years'

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under the pressure of this litigation, did NRDC concede "that the Agency now has completed all its commitments under Paragraph 12." (NRDC's Response, at 7.)

[9] EPA is having particular difficulty in issuing effluent limitation regulations for the organic chemicals and plastics and synthetics industries. The deadline currently in paragraph 7 for issuing final regulations is February 1985. However, EPA has announced that the data available are not adequate. It has sought extensive additional data, by way of over 3,000 separate questionnaires to industrial facilities and also through a further plant-effluent sampling program. EPA currently plans to issue a *Federal Register* notice in August 1984, reopening the period for comment on the new data. *See* 49 *Fed. Reg.* 16,379 (April 19, 1984). An affidavit by Mr. Steven Schatzow of EPA, accompanying a motion to the district court dated December 22, 1983, advised that February 1985 was "the earliest date, based on best-case assumptions, by which EPA can [could] complete the formidable tasks before it and responsibly promulgate this regulation." (Schatzow Affidavit, ¶ 12.) EPA warned that if the new information being gathered turned out to be not "generally consistent with [its] expectations," then it would have to revise portions of its analyses and would require significant additional time to do so. (*Id.*, ¶ 13.) Petitioners have been advised that EPA currently is running more than several months behind this "best-case" schedule.

[10] Paragraph 4(c) requires EPA to identify and to regulate by pretreatment standards pollutants other than those on lists specified in the decree. EPA on March 20, 1984 gave notice that it was making available a "Paragraph 4(c) Program Summary Report"

work to satisfy the portions of the decree at issue in this case, and, as noted, several of the remaining tasks are quite significant to petitioners and other members of the public. In seeking to dissuade the Court from granting review, NRDC, and to a lesser extent EPA as well, have omitted to state facts that show that this case is definitely not moot, nor likely to become so in the coming several years.

3. EPA's response advises that "the [current] Administrator has indicated his willingness to abide by the terms of the decree" (*id.*, at 14), and EPA's opposition to granting certiorari seems to hinge on that circumstance. EPA's response suggests that the circumstance lessens the separation-of-powers concerns and that there thus is no need for this Court to hear the case. But, as Judge Wilkey pointed out in his dissent in the court of appeals, "[f]or reasons that ultimately have to do with preserving the democratic nature of our Republic, American

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describing its work thus far under that portion of the decree. 49 *Fed. Reg.* 10,357 (March 20, 1984). In its report, EPA disclosed that it had listed six compounds and would begin regulatory action:

> Paragraph 4(c) requires EPA to undertake regulatory action for the compounds on the list. Because Paragraph 4(c) deals with pretreatment standards, EPA will initiate an engineering study to support development of pretreatment standards for the six compounds.
>
> Summary Report, at 26.

EPA estimated that over two years would be requir[illegible] complete its work:

> At this time it is estimated that it will [illegible] least eleven months to complete the plant selection, sampling, and analyses phase of the program. Decisions on regulatory strategy and completion of the engineering report are expected to take an additional three months. Proposal and promulgation of rules could take an additional twelve to eighteen months. We anticipate that the engineering study will start during the second quarter of 1984.
>
> Summary Report, at 28.

A copy of the Summary Report has been lodged with the Clerk for this Court's reference.

courts have never allowed an agency chief to bind his successor in the exercise of his discretion." (718 F.2d 1134, Pet. App. 38a-39a (footnote omitted).) Especially given the remarkable lack of consistency in the attitudes of the current and prior Administrators towards the decree, the seemingly reluctant embrace of the decree by the current Administrator should not affect this Court's consideration.[11] If the discretion-constraining portions of the decree are not constitutionally valid, they are invalid for this Administrator as well as for all of his predecessors and successors. Neither this Administrator nor any other can waive a constitutionally-based limitation on federal judicial power. *See* Petition, at 22-25.[12]

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[11] During the nearly eight years of the decree's existence, the Administrators of EPA have taken a variety of inconsistent positions regarding the decree. Indeed, individual Administrators have not themselves always been consistent in their approach. These zig-zags are reflected in the record, and especially in the fact that an Administrator sought essentially the same modification of the decree to remove the discretion-constraining provisions as that which petitioners sought; procedurally, the denial both of EPA's motion and of petitioners' motion is before the Court in this case. See EPA's Response, at 7-8, 12-13 n.16.

[12] A bar to consideration of the separation-of-powers issue might arise if Congress had expressly sanctioned the constraints in the decree on EPA's discretion. In a different context, NRDC does assert without elaboration that "Congress has specifically approved and endorsed the provisions of the Decree." NRDC's Response, at 13. EPA suggests that Congress may have implicitly sanctioned some of the substantive terms of the decree. EPA's Response, at 13. The issue came before the court of appeals in 1980 in connection with petitioners' claim that in adopting the 1977 Amendments to the Clean Water Act, Congress intended the Amendments to supersede the decree. (636 F.2d 1238, Pet. App. 56a.) The court then decided the negative proposition, *i.e.*, that Congress had no such intent (636 F.2d 1244, Pet. App. 70a), a decision put before this Court by the second question in the petition. The court of appeals expressly did not conclude affirmatively that Congress had adopted the decree. This is also shown by the fact that the court at that time remanded the litigation to the district court for consideration of the constrained-discretion issue (636 F.2d 1258-59, Pet. App. 98a-100a).

CONCLUSION

The petition for certiorari should be granted.

In very recent reports, EPA has stated that approximately 26 to 32 months will be required to complete action on the discretion-constraining portions of the decree. The Agency nonetheless suggests that the case is moot or nearly so. If this Court does not opt to consider this case fully on the merits, it should vacate the decision of the court of appeals and remand to that court for further proceedings to determine whether the decree should be terminated or modified in light of EPA's suggestion of mootness.

Respectfully submitted,

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